

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

DAVID SELL, 97-B-2642,
Petitioner

ANSWER

v

10-CV-6182L

JAMES T. CONWAY,
Respondent

Respondent JAMES T. CONWAY, by his attorney FRANK A. SEDITA, III, District Attorney of the County of Erie, State of New York, MICHAEL J. HILLERY, Assistant District Attorney, of counsel, respectfully answers the petition as follows:

1. Admits the allegations contained in paragraphs 1-11 and 13-17. Regarding paragraph 10(b), however, the Appellate Division, Fourth Department, denied permission to appeal the order of the Supreme Court, Erie County, dated September 14, 2009, on March 18, 2010. Regarding paragraph 15(d), petitioner was represented on direct appeal by Mary Good, Esq.

2. The People deny that there is merit to the grounds set forth in paragraph 12.

3. Respondent hereby submits to this Court the record of petitioner's conviction which includes:

EXHIBIT A The court file and transcripts submitted herewith.

EXHIBIT B Brief for petitioner and responding brief submitted to the Appellate Division, Fourth Department.

Memorandum unanimously affirming the conviction dated May 2, 2001.

EXHIBIT C Decision of the Court of Appeals denying Leave to appeal dated June 28, 2001.

EXHIBIT D Petitioner's CPL 440.10 motion to vacate the judgment dated August 5, 2002.

People's answering affidavit dated February 26, 2003.

Attorney affirmation on behalf of petitioner dated June 24, 2003.

People's answering affidavit dated July 8, 2003.

Memorandum and Order dated August 29, 2003.

EXHIBIT E Petitioner'S motion for leave to appeal denial of his CPL 440.10 motion dated October 9, 2003.

People's opposing letter dated October 28, 2003.

Decision of the Appellate Division, Fourth Department unanimously affirming the conviction dated October 3, 2008.

Petitioner's brief to the Appellate Division, Fourth Department dated February 2008.

People's responding brief dated March 11, 2008.

Certificate denying leave to appeal dated March 12, 2009.

EXHIBIT F Petitioner's notice of motion to vacate judgment dated March 18, 2009.

People's opposing affidavit dated May 27, 2009.

Petitioner's supplemental pleadings dated July 3, 2009.

People's supplemental opposing affidavit dated August 12, 2009.

Petitioner's second reply dated August 27, 2009.

Memorandum and Order dated September 14, 2009, denying motion.

EXHIBIT G Application for leave to appeal dated October 8, 2009.

People's letter dated October 28, 2009.

Appellate Division, Fourth Department denying leave dated March 18, 2010.

FIRST DEFENSE

4. Petitioner is not entitled to *habeas* relief based on his claim that the prosecutor used a peremptory challenge to remove a juror based on race.

5. Petitioner has failed to overcome the presumption of correctness accorded to the state court's finding of no pretext. *See Miller-El v Cockrell*, 537 U.S. 322, 339-340 (2003).

SECOND DEFENSE

6. Petitioner's claim that his federal constitutional rights were violated when the trial court denied his motion to remove a sworn juror lacks merit.

7. There was no claim of deliberate concealment or "purposefully incorrect responses" during jury selection sufficient to show a prejudicial impairment of petitioner's right to exercise

a peremptory challenge. *Mccoy v Goldston*, 652 F.2d 654, 658 (6th Cir. 1981).

THIRD DEFENSE

8. The record does not support petitioner's claim that the People failed to meet their obligations under *Brady v Maryland*, 373 U.S. 83 (1963).

FOURTH DEFENSE

9. Petitioner's claim of ineffective assistance of counsel lacks merit, as he has failed to establish that trial counsel's representation was deficient, and that, but for the deficiency, there is a "reasonable probability" that the outcome would have been different. *Strickland v Washington*, 466 U.S. 668, 688-94 (1984).

FIFTH DEFENSE

10. Petitioner's allegation that the grand jury proceedings were defective is not reviewable in a petition for *habeas corpus* relief. See *Lopez v Riley*, 865 F.2d 30, 32-33 (2d Cir. 1989).

11. Petitioner's claim of prosecutorial misconduct regarding the grand jury proceedings is meritless.

SIXTH DEFENSE

12. Finally, petitioner's claim that the People were allowed to unlawfully amend the indictment to reflect accomplice liability is meritless.

13. The theory of liability is not an essential element of the offense, and there is no distinction between liability as a principal and liability as an accomplice. *Chandler v Moscicki*, 253 F.Supp.2d 478, 486-88 (W.D.N.Y. 2003).

WHEREFORE, respondent respectfully requests that an Order be granted dismissing the petition in all respects.

Dated: Buffalo, New York
September 13, 2010

FRANK A. SEDITA, III
District Attorney of Erie County

s/Michael J. Hillery
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Petitioner

AFFIDAVIT
OF SERVICE

v

10-CV-6182L

JAMES T. CONWAY,
Respondent

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

RITA A. PLATT, being duly sworn, deposes and says:

That she is over the age of twenty-one (21) years and is employed by the County of Erie at the Erie County District Attorney's Office; that on September 13, 2010, she served the within Answer upon David Sell, petitioner, addressed to David Sell, 97-B-2642, at his last known address, C/O Attica Correctional Facility, P.O. Box 149, Attica, New York 14011, by depositing a true copy of same, securely enclosed in a postpaid wrapper, in a post office box regularly maintained by the United States Postal Service at the Erie County Hall in the City of Buffalo, New York in the above-captioned matter.

s/Rita A. Platt
RITA A. PLATT

Subscribed and sworn to before
me on September 13, 2010.

s/Donna A. Milling
DONNA A. MILLING
Notary Public, State of New York
Qualified in Erie County
My Commission Expires February 9, 2012.